No. 14-462

In The
Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Second District

BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER DIRECTV, INC.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—the Voice of the Defense Bar (DRI) is an international organization that includes more than 21,000 members involved in the defense of civil litigation. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly participates as *amicus curiae* in cases that raise issues of vital concern to its members, their clients, and the judicial system.

This case is of significant interest to DRI because its members routinely represent clients seeking to compel arbitration of claims brought under consumer protection, wage and hour, or other state laws that are subject to binding arbitration clauses. Accordingly, DRI's members are familiar with the common occurrence of state courts refusing to enforce arbitration clauses (including in class action litigation) because of state public policy, unconscionability principles, or other tenets of state law.

This case represents the latest in a long line of state court cases refusing to enforce the preemptive

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[1] This brief was authored by *amicus curiae* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amicus curiae*, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief. *Amicus curiae* has notified the parties of its intention to file this brief. All parties provided written consent to the filing of *amicus curiae* briefs, and this written consent is on file with this Court.

mandate of the Federal Arbitration Act (FAA) that arbitration clauses be enforced according to their terms. Of particular concern to DRI and its members is the California Court of Appeal's refusal to acknowledge the basic constitutional principle, embodied in the Supremacy Clause of the U.S. Constitution, that federal law is part of the law of every state and that state law to the contrary is invalid.

DRI and its members seek uniform application of the FAA across the nation in order to ensure that arbitration can achieve its basic purpose of resolving disputes efficiently, predictably, and at minimal cost. The California Court of Appeal's decision in this case thwarts that goal. This Court should reverse the California Court of Appeal's decision.

SUMMARY OF ARGUMENT

Enacted "in response to widespread judicial hostility to arbitration," the Federal Arbitration Act (FAA) requires courts to "'rigorously enforce' arbitration agreements according to their terms," including the terms setting "'the rules under which that arbitration will be conducted.'" *Am. Express Co. v. Italian Colors Rest.* (*Italian Colors*), 570 U.S. __, 133 S. Ct. 2304, 2308-09 (2013).

As this Court has recognized, "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration. It is a matter of great

importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. __, 133 S. Ct. 500, 501 (2012) (per curiam). Unfortunately, state courts have long exhibited the very "judicial hostility towards arbitration that prompted the FAA" decades ago, and have employed "'a great variety' of 'devices and formulas'" to avoid enforcing arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, 131 S. Ct. 1740, 1747 (2011). "California's courts" in particular "have been more likely" to apply their own state laws to preclude the enforcement of arbitration agreements. *Id.*

Before this Court's seminal decision in *Concepcion*, the California Supreme Court used various devices to evade the preemptive force of the FAA. Beginning in 1999, in an effort to ensure that plaintiffs could vindicate state statutory rights that California had deemed essential as a matter of state public policy, California's high court held that the FAA did not preempt state public policies that prohibited enforcement of certain types of arbitral procedures or arbitration of particular types of claims. But *Concepcion* made clear that state courts had been wrong in so narrowly construing the preemptive scope of the FAA, holding that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms'" and that states cannot—whether in the guise of unconscionability, public policy, or some other state law defense—"require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1747-48, 1753.

Despite *Concepcion*'s sharp rebuke, California and other state courts have persisted in using unconscionability, vindication of state public policy, and similar rationales to resist the mandate of the FAA. The California Court of Appeal's opinion in this case is simply the latest example of this continuing trend. That court interpreted the arbitration clause in DIRECTV's customer agreement by looking to California law directly overruled by *Concepcion*. Pet. App. 6a-10a. This reading violates the Supremacy Clause of the U.S. Constitution, as there is no such thing as state law divorced from the preemptive effect of federal law. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 157 & n.12 (1982); *see also Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1225-26 (9th Cir. 2013). California may not "opt out" of the Supremacy Clause, no matter how important its contrary state policy may be. "When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established. See U.S. Const., Art. VI, cl. 2." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. __, 132 S. Ct. 1201, 1202 (2012) (per curiam).

This brief will trace the history of California and other state courts' efforts to avoid enforcing arbitration agreements according to their terms, as mandated by the FAA, and will show how that unfortunate trend continues to this day. As this historical overview confirms, this Court's ongoing vigilance is necessary to ensure that state courts do not thwart the FAA's purpose as they have so often done in the past. This Court should hold that state courts cannot divorce their own laws from the FAA and should direct

California courts in particular—with their long history of attempts to evade the FAA's mandate—to enforce arbitration agreements according to their terms, as federal arbitration law commands.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT HAS LONG RESISTED THE FAA'S PREEMPTIVE EFFECT.

The California Court of Appeal's effort to circumvent the FAA in this case is not a unique occurrence. Rather, it is part of a long-standing hostility among state courts towards the FAA. California in particular has a history of aggressively refusing to enforce arbitration agreements, notwithstanding this Court's rulings to the contrary. *See Concepcion*, 131 S. Ct. at 1747. To illustrate the point, we provide a brief history of the California Supreme Court's longstanding resistance to this Court's FAA precedents.

1. ***Broughton.*** In a 1999 opinion, the California Supreme Court recognized that this Court's decisions had previously discussed "whether *Congress* had intended *federal statutory claims* to be exempt from arbitration." *Broughton v. Cigna Healthplans of Cal.*, 21 Cal. 4th 1066, 1082-83, 988 P.2d 67, 78 (1999) (second emphasis added). *Broughton*, however, applied this Court's "vindication" of *federal* claims to claims asserting *state* statutory rights under California's Consumers Legal Remedies Act, in order to avoid a

perceived potential for "the vitiation through arbitration of the substantive rights afforded by" state statutes. *Id.* at 1083, 988 P.2d at 79; *see also Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303, 307, 66 P.3d 1157, 1159 (2003) (reaffirming *Broughton*'s holding and extending it to forbid arbitration of public injunctive relief claims brought under California's Unfair Competition Law and False Advertising Law).

The California Supreme Court failed to appreciate that while Congress is free to enact federal laws that override or limit earlier federal laws, including the FAA, the states are not. The federal rights vindication exception posited by this Court derives from "the *congressional* intention expressed in some other [federal] statute" in which "*Congress* itself has evinced an intention" to exempt federal statutory rights from arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-28 (1985) (emphases added). In that narrow context, this Court has suggested that, where a party cannot effectively vindicate a *federal statutory claim* in the arbitral forum, an inherent conflict may exist between arbitration and the underlying purpose of a *federal* statute sufficient to override the FAA's mandate. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28 (1991); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-27, 242 (1987).

In short, the so-called "vindication" exception to the FAA is "reserved for claims brought under federal statutes" because it "rest[s] on the principle that other federal statutes stand on equal footing with the FAA." *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 936 (9th Cir. 2013); *see also Nitro-Lift*, 133 S. Ct. at 504

("[T]he ancient interpretive principle that the specific governs the general . . applies only to conflict between laws of equivalent dignity. Where a specific statute, for example, conflicts with a general constitutional provision, the latter governs. And the same is true where a specific state statute conflicts with a general federal statute. There is no general-specific exception to the Supremacy Clause ").

But, in *Broughton*, the California Supreme Court held a vindication defense may be applied to hold that state statutory claims survive FAA preemption because arbitration is inappropriate where the arbitral forum "cannot necessarily afford" all the procedural "advantages" available in court. 21 Cal. 4th at 1083, 988 P.2d at 78-79.

2. ***Armendariz.*** One year after it decided *Broughton,* the California Supreme Court held, in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 90-91, 99-103, 6 P.3d 669, 674, 679-82 (2000), that courts can, as a matter of state public policy, refuse to enforce mandatory employment agreements to arbitrate unwaivable state statutory claims for employment discrimination if the procedures the parties adopted in their contract threaten the ability of a party to fully and effectively vindicate a state statutory claim in the arbitral forum. *Id.* at 99-103, 6 P.3d at 680-82 (citing *Broughton*, 21 Cal. 4th at 1087, 988 P.2d at 81-82, and *Gilmer*, 500 U.S. at 27-28). *Armendariz* reasoned that this refusal to enforce was not preempted by the FAA because federal cases permitted courts not to enforce arbitration agreements where the "arbitral forum" would not be "adequate" to

vindicate certain statutory rights. *See Armendariz*, 24 Cal. 4th at 98-99, 6 P.3d at 679-80.

Armendariz also held the arbitration clause at issue to be unconscionable. Rather than apply general principles of unconscionability law, the court invented arbitration-specific rules mandating a "modicum of bilaterality" in arbitration—i.e., that an arbitration clause required as a condition of employment must apply to both claims more likely to be brought by an employer and claims more likely to be brought by an employee. *Id.* at 117-18, 6 P.3d at 692-93. In reaching this conclusion, the California Supreme Court rejected the notion that its version of unconscionability law impermissibly "takes its meaning precisely from the fact that a contract to arbitrate is at issue," *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987), and thus was preempted by the FAA. Instead, it held that "ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." *Armendariz*, 24 Cal. 4th at 119, 6 P.3d at 693.

3. ***Little.*** Next, in *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1076-81, 63 P.3d 979, 987-90 (2003), the California Supreme Court reiterated *Armendariz*'s state public policy limitation on the enforceability of arbitration agreements governed by the FAA. *Little* emphasized that California's public policy against exculpatory contracts renders certain state-law claims unwaivable, and that this policy would be violated unless the parties' agreed-upon arbitration procedures matched up with the procedures that *Armendariz* said were "necessary to enable an

employee to vindicate these unwaivable rights in an arbitration forum." *Id.* at 1076-77, 63 P.3d at 987.

Little acknowledged that *Armendariz*'s vindication of state public policy "specifically concern[ed] arbitration agreements" and was "unique" to the "context of arbitration." *Id.* at 1079, 63 P.3d at 989. *Little* nonetheless maintained that this vindication defense was not preempted by the FAA. *Id.*, 63 P.3d at 988-89. *Little* relied on the FAA saving clause permitting courts not to "enforce an arbitration agreement based on 'generally applicable contract defenses.'" *Id.*, 63 P.3d at 989. According to *Little*, one such defense is California's public policy against exculpatory contracts that "force a party to forgo unwaivable public rights." *Id.* at 1079-80, 63 P.3d at 989.

Little also further developed California's arbitration-specific unconscionability rules. *Little* held that one type of substantively unconscionable arbitration clause originates with "the party imposing arbitration [who] mandates a post-arbitration proceeding, either judicial or arbitral, wholly or largely to its benefit at the expense of the party on which the arbitration is imposed." *Id.* at 1072, 63 P.3d at 984. The court then invalidated a contractual term authorizing either party to appeal to a second arbitrator from an arbitral award exceeding $50,000, concluding it would unduly favor defendants over plaintiffs. *Id.* at 1071-74, 63 P.3d at 983-85.

4. ***Discover Bank.*** Two years later, in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 160-73, 113 P.3d 1100, 1108-17 (2005), the California

Supreme Court invoked the vindication of state law principle applied in *Armendariz* and *Little*, this time under the rubric of unconscionability.

Discover Bank addressed whether courts may invalidate class arbitration waivers pursuant to an unconscionability defense. *Id.* at 152-53, 160-63, 113 P.3d at 1103, 1108-10. The California Supreme Court held that, since class actions and arbitrations are "often inextricably linked to the vindication" of substantive state rights, such waivers are contrary to California public policy and therefore unconscionable when class actions are the only effective way to halt and redress wrongful conduct. *Id.* at 160-63, 113 P.3d at 1108-10. As with the vindication of state public policy defense against arbitration adopted in *Armendariz* and *Little*, *Discover Bank* held that the FAA did not preempt its unconscionability holding because, while it was tailored to arbitration agreements, the finding of unconscionability could be traced to a general state public policy against exculpatory contracts. *See id.* at 163-67, 113 P.3d at 1110-13.

5. ***Gentry.*** *Gentry v. Superior Court*, 42 Cal. 4th 443, 456-63, 165 P.3d 556, 563-68 (2007), held that, where employees assert unwaivable state statutory wage claims subject to an arbitration agreement that precludes any attempt to pursue those claims on a classwide basis, this preclusion *of a class procedure* is unenforceable as a matter of California public policy if the dispute resolution method specified in the employment contract—i.e., individual arbitration—could not as effectively vindicate the employee's substantive rights under the state's Labor Code.

Gentry held that applying this vindication of state public policy defense to invalidate class arbitration waivers was not preempted by the FAA because the FAA permitted courts to limit the enforcement of arbitration procedures based on state public policy where those procedures "significantly undermine the ability of employees to vindicate" their state statutory rights. *Id.* at 465 & n.8, 165 P.3d at 569 & n.8.

6. *Sonic I.* In *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic I*), 51 Cal. 4th 659, 668-69, 679, 681 n.4, 247 P.3d 130, 133-34, 140-41, 142 n.4 (2011), the California Supreme Court concluded that an agreement to resolve disputes through arbitration impermissibly waived the "advantages" of certain procedures that California laws made available to employees who pursue state statutory wage claims in an administrative proceeding before the state Labor Commissioner's office. *Id.* at 671-72, 247 P.3d at 135.

Applying its vindication of state public policy defense, the California Supreme Court concluded that substituting arbitration as an alternative to the Labor Commissioner procedures violated California public policy and rendered the agreement unconscionable as written. *Id.* at 678-84, 686-87, 247 P.3d at 140-44, 145-46. Applying the reasoning of *Discover Bank* and *Gentry*, the court also held that this result was not preempted by the FAA. *Id.* at 687-95, 247 P.3d at 146-52.

II. IN *CONCEPCION* AND *ITALIAN COLORS*, THIS COURT CLARIFIED THE BROAD PREEMPTIVE SCOPE OF THE FAA, CRITICIZED STATE COURT EFFORTS TO RESIST ARBITRATION, AND REJECTED THE COST OF VINDICATING STATUTORY RIGHTS IN ARBITRATION AS A REASON FOR NOT ENFORCING CLASS ARBITRATION WAIVERS.

Concepcion explained that, under the FAA, parties may agree "to arbitrate *according to specific rules*" and courts must "enforce [those agreements] *according to their terms*." *Concepcion*, 131 S. Ct. at 1745, 1748-49 (emphases added). Congress was careful to temper the FAA's mandate to respect parties' freedom of contract by including in the FAA a saving clause that preserves generally applicable contract defenses from preemption. *Id.* at 1748.

But even a defense that a state court characterizes as generally applicable to all contracts is preempted by the FAA if the defense "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1747-48. When, as a practical matter, a nominally arbitration-neutral contract defense disproportionately invalidates arbitration agreements, the defense erects a barrier to the FAA's objective of allowing parties the freedom to structure contractual terms for dispute resolution—or not to contract at all if those terms are unacceptable. *See id.* (generally applicable state contract defenses are preempted by the FAA where they "disfavor[ ] arbitration" by having a "disproportionate impact" on arbitration agreements and frustrating the FAA's

"overarching purpose" of "ensur[ing] the enforcement of arbitration agreements according to their terms").

Concepcion applied these principles to hold that the FAA preempted the unconscionability standard adopted by the California Supreme Court in *Discover Bank*. *Id.* at 1746-53. This Court rejected the assertion that California's policy against exculpatory contracts—California's state law version of the vindication exception to the FAA—could override the FAA's principal objective of enforcing arbitration agreements according to their terms. *Concepcion* acknowledged that the FAA's "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses.'" *Id.* at 1746. But *Concepcion* determined that where courts hold arbitration procedures to be "unconscionable or unenforceable as against public policy" *based on their "general principle of unconscionability or public-policy disapproval of exculpatory agreements,"* such state-law defenses "[i]n practice . have a disproportionate impact on arbitration agreements" even though they "presumably apply" to all contracts. *Id.* at 1747 (emphasis added). *Concepcion* therefore held that such state-law unconscionability or public policy standards are preempted by the FAA. *Id.* at 1747-48.

In short, *Concepcion* held *Discover Bank* to be preempted because *Discover Bank*'s unconscionability standard "allowed courts to ignore and refuse to enforce the clear terms of the parties' agreement, and instead employ a judicial policy judgment" that a procedure to which the parties did not contractually agree "would better promote the vindication of the parties' rights in certain cases." *Truly Nolen of Am. v.*

Superior Court, 208 Cal. App. 4th 487, 506, 145 Cal. Rptr. 3d 432, 445 (2012).

Some courts have suggested that *Concepcion* did not address whether the FAA prevents courts from refusing to enforce agreements to arbitrate statutory claims where the plaintiff could establish the agreed-upon arbitration procedures were insufficient to vindicate statutory rights. *See, e.g.*, *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d 528, 535-36 (S.D.N.Y. 2012), *rev'd*, 726 F.3d 290 (2d Cir. 2013). But this Court's intervening decision in *Italian Colors* confirmed that *Concepcion* addressed precisely that vindication rationale.

In *Italian Colors*, the defendants sought to compel arbitration of the plaintiffs' federal antitrust claims on an individual basis pursuant to the arbitration agreement's class arbitration waiver. *Italian Colors*, 133 S. Ct. at 2307-08. The Second Circuit held that this waiver was unenforceable under the vindication exception because evidence "establishe[d], as a matter of law, that the cost of plaintiffs' individually arbitrating" their federal antitrust claims "would be prohibitive." *In re Am. Express Merchs.' Litig.*, 667 F.3d 204, 217-19 (2d Cir. 2012). The Second Circuit distinguished *Concepcion* on the ground that it dealt with the FAA's preemption of state-law defenses to arbitration rather than with a vindication analysis. *Id.* at 212-13.

This Court reversed and held that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Italian Colors*, 133 S.

Ct. at 2311. The Court thus rejected the notion that the vindication principle, if it exists at all, allows a court to invalidate a class arbitration waiver on the ground that it would be uneconomical for the plaintiff to proceed with her claims on an individual, rather than a class-wide, basis. *Id.* at 2310-11.

In rejecting the plaintiff's arguments under the vindication exception, this Court held that *Concepcion* "all but resolves this case" and expressly rejected the dissenting opinion's view that *Concepcion* did not involve the vindication rationale. *Id.* at 2312 & n.5. Moreover, while Justice Kagan's dissenting opinion disagreed with the majority's view that *Concepcion* dealt with a vindication analysis, even the dissent acknowledged that states could not circumvent the FAA's mandate based on a concern for the vindication of state law, explaining that the FAA has "no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law." *Id.* at 2320 (Kagan, J., dissenting).

III. SINCE *CONCEPCION*, STATE COURTS HAVE CONTINUED TO RESIST THE PREEMPTIVE EFFECT OF THE FAA.

In the years since this Court decided *Concepcion*, the California Supreme Court and other state high courts have continued to resist the FAA's preemptive mandate.

1. ***Sonic II.*** *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic II*), 57 Cal. 4th 1109, 311 P.3d 184 (2013)[2] addressed whether the plaintiff could "vindicate his right to recover unpaid wages" under California law and, in particular, "whether any barrier to vindicating such rights would make the arbitration agreement unconscionable or otherwise unenforceable . . . and, if so, whether such a rule would be preempted by the FAA." *Id.* at 1142, 311 P.3d at 200.

The California Supreme Court noted that, when an employee elects to pursue his state statutory right to recover unpaid wages before the Labor Commissioner rather than in court, state law affords the employee certain hearing and posthearing procedures that are designed to "reduc[e] the costs and risks of pursuing a wage claim in several ways." *Id.* at 1129, 311 P.3d at 191. The court held it appropriate to consider whether agreed-upon arbitration procedures fail to include these statutory procedures, and whether the absence of these procedures fails to "provide an employee with an accessible and affordable arbitrable forum for resolving wage disputes." *Id.* at 1146, 311 P.3d at 203.[3]

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[2] This Court vacated *Sonic I* and remanded for reconsideration in light of *Concepcion*. *See Sonic-Calabasas A, Inc. v. Moreno*, 565 U.S. __, 132 S. Ct. 496 (2011).

[3] The *Sonic II* court did not suggest that the arbitration agreement actually waived the employee's right to pursue unpaid wages. Instead, the court emphasized that the unconscionability inquiry focuses on whether the arbitral scheme, in failing to

(continued...)

The court insisted that this unconscionability standard survived FAA preemption even after *Concepcion* and *Italian Colors*. Citing *Armendariz*'s discussion of the vindication of state statutory rights, the majority maintained that the FAA allows state courts to refuse to enforce agreements to arbitrate state statutory claims where arbitration would not afford procedural benefits that plaintiffs would have received outside arbitration. *Id.* at 1150-52, 311 P.3d at 206-08 (citing *Armendariz*, 24 Cal. 4th at 98-99, 6 P.3d at 679-80, and *Mitsubishi Motors*, 473 U.S. at 626-28). The majority reasoned that those procedures would help "vindicate" a state statutory right. *Sonic II*, 57 Cal. 4th at 1155, 311 P.3d at 209.

Justice Chin's dissenting opinion emphasized that under *Concepcion* and its progeny, the FAA precludes state courts from refusing to enforce arbitration agreements based on a concern that arbitration procedures prevent vindication of state statutory rights. *See id.* at 1184-92, 311 P.3d at 230-36 (Chin, J., dissenting). Justice Chin also explained that the majority's decision impermissibly applied a state-law contract defense to an arbitration agreement based on the uniqueness of that agreement. *Id.* at 1190-91, 311 P.3d at 235. The *Sonic II* majority insisted that the FAA authorizes the vindication of state statutory

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(...continued)

provide these statutory procedures, "imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable" by creating "practical impediments to the use of arbitration to resolve wage disputes." *Id.* at 1148, 1168, 311 P.3d at 204, 219.

rights because courts have the power to create state law rules "uniquely in the context of arbitration." *Id.* at 1143, 311 P.3d at 201 (majority opinion). However, "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what the state legislature cannot.'" *Concepcion*, 131 S. Ct. at 1747. Such an arbitration-specific rule is preempted by the FAA because it has "a disproportionate impact on arbitration agreements." *Id.*

By improperly applying a vindication rationale with a unique and disproportionate focus on arbitration, and grounding it on an unconscionability standard that is peculiar to arbitration, *Sonic II*'s development of a "unique rule" for arbitration agreements flouted *Concepcion*. *Sonic II*, 57 Cal. 4th at 1190, 311 P.3d at 235 (Chin, J., dissenting).

The unconscionability standard the California Supreme Court applies to arbitration agreements turns on whether the agreements are permeated with a certain "degree of unfairness." *Id.* at 1160, 311 P.3d at 213 (majority opinion). But California's assessment of whether an arbitration agreement is sufficiently fair embodies little more than a state *policy* judgment about the efficacy of arbitration in vindicating a plaintiff's rights.

The FAA precludes such state policy judgments concerning the fairness of contractually agreed-upon arbitration procedures. "[S]treamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *McMahon*, 482 U.S. at 232.

The FAA imposes a binding value judgment about the merits of enforcing arbitration agreements as written, which cannot be superseded by state public policy in the guise of an unconscionability defense. *See Concepcion*, 131 S. Ct. at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). "[T]here is nothing inherently unfair or oppressive about arbitration clauses." *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986).

Contrary to the California Supreme Court's pronouncement in *Sonic II*, state courts cannot evaluate arbitration agreements based on whether the arbitration process sufficiently resembles the advantageous litigation procedures from which one party may benefit under state law outside the arbitral forum, even if the court believes that this comparative analysis may be desirable to that party (invariably, the plaintiff as it turns out) for fairness reasons. *See Concepcion*, 131 S. Ct. at 1752-53; *see also Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 600 (6th Cir. 2013) (holding that arbitration procedure could not be found unconscionable so as to defeat FAA preemption, even though it was adhesive and one-sided, since "all of these things—the one-sided nature of the arbitration clause, and its adhesive nature—were also present" in *Italian Colors* yet this Court found the arbitration agreement there enforceable, "all of those concerns notwithstanding").

By definition, such a comparison test depends, improperly, on the uniqueness of arbitration. *See Ex parte McNaughton*, 728 So. 2d 592, 598-99 (Ala. 1998). "[T]he heart of the asserted unfairness is the disparity"

between arbitration and litigation outside the arbitral forum, and the supposed lack of fairness therefore improperly derives its meaning from the fact that an arbitration agreement is at issue. *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1169 (10th Cir. 2014). Simply put, "just as the FAA preempts a state statute that is predicated on the view that arbitration is an inferior means of vindicating rights, it also preempts state common law—including the law regarding unconscionability—that bars an arbitration agreement because of the same view." *Id.* at 1167.

2. ***Iskanian.*** In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 362-66, 327 P.3d 129, 134-37 (2014), the California Supreme Court revisited its holding in *Gentry* that class waivers in mandatory employment arbitration agreements are unenforceable as against public policy where such waivers prevent the effective vindication of employees' unwaivable rights under state wage and hour laws. The court overruled *Gentry*, holding that "[u]nder the logic of *Concepcion*, the FAA preempts *Gentry*'s rule against employment class waivers." *Id.* at 364, 327 P.3d at 136.

Nevertheless, the California Supreme Court went out of its way to reaffirm that "an arbitration process [must be] accessible, affordable, and consistent with fundamental attributes of arbitration" and that "the FAA does not prevent states through legislative or judicial rules from addressing the problems of affordability and accessibility of arbitration." *Id.* at 366, 327 P.3d at 137.

Although he concurred in the result, Justice Chin again disagreed with the majority's reaffirmance of the *Sonic II* standard because "an arbitration agreement may not be invalidated based on a court's subjective view that the agreement's waiver of the [Labor Commissioner] procedures and protections would render arbitration less 'effective for wage claimants' than a 'dispute resolution mechanism' that includes those procedures and protections." *Id.* at 393, 327 P.3d at 156 (Chin, J., concurring).

3. Other state court cases since *Concepcion*. Other state supreme courts have continued to resist and evade *Concepcion* since this Court decided that case in 2011. Indeed, this Court has itself twice had to summarily reverse state high courts that have flatly refused to apply the FAA as construed in *Concepcion*.

In *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. __, 132 S. Ct. 1201 (2012) (per curiam), this Court summarily reversed a decision of the West Virginia Supreme Court of Appeals that refused to enforce an arbitration agreement. The plaintiffs in *Marmet* brought negligence and wrongful death actions against nursing homes in which their relatives had died, and the state high court refused to enforce agreements requiring that such claims be arbitrated. *Id.* at 1202-03. The state supreme court held that "'Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce, particularly where the agreement involves a service that is a practical necessity for

members of the public.'" *Id.* at 1203. In reversing that decision, this Court reiterated that "West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." *Id.* at 1203-04.

Shortly after *Marmet*, this Court summarily reversed another state high court decision refusing to compel arbitration, this time from Oklahoma. *See Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. __, 133 S. Ct. 500, 501 (2012) (per curiam). In that case, the Oklahoma Supreme Court refused to enforce an arbitration clause in a noncompetition agreement between Nitro-Lift and two former employees, holding that Oklahoma law embodying a state public policy against noncompetition agreements trumped the FAA's mandate that an arbitrator decide whether the noncompetition agreements were valid. *Id.* at 501-02. In reversing, this Court emphasized that "State courts rather than federal courts are most frequently called upon to apply the [FAA] , including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Id.* at 501. The Oklahoma Supreme Court disregarded the FAA in "assum[ing] the arbitrator's role by declaring the noncompetition agreements null and void"; "the FAA forecloses precisely this type of 'judicial hostility towards arbitration.'" *Id.* at 503.

Other state supreme court opinions have likewise continued resisting *Concepcion* in less obvious,

but no less troubling, ways. One example of this trend is *Schnuerle v. Insight Communications Co.*, 376 S.W.3d 561, 573 (Ky. 2012), where the Kentucky Supreme Court applied *Concepcion* to an arbitration agreement between a broadband Internet company and its subscribers that contained a class arbitration waiver. *Id.* at 565-66. While the state high court reluctantly held that *Concepcion* compelled it to enforce the class waiver under the FAA, *id.* at 569, the court imposed a significant caveat:

> *Concepcion* does not disturb the basic principle that an arbitration clause is not enforceable if it fails to provide plaintiffs with an adequate opportunity to vindicate their claims. Accordingly, arbitration clauses certainly may continue to be struck down as unconscionable if their terms strip claimants of a statutory right, which cannot be vindicated by arbitration, because, for example, the arbitration costs on the plaintiff are prohibitively high.

Id. at 573. Thus, the Kentucky Supreme Court has preserved the effective vindication rationale as applied to state law that this Court has long condemned. *See Perry*, 482 U.S. at 489-90; *Mitsubishi Motors*, 473 U.S. at 628; *Southland Corp. v. Keating*, 465 U.S. 1, 10-11, 16 & n.11 (1984).

Similarly, in *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wash. 2d 598, 603-10, 293 P.3d 1197, 1199-1203 (2013), the Washington Supreme

Court narrowly construed *Concepcion* in invalidating an arbitration clause in a debt adjustment contract. *Gandee* held that the venue, fee-shifting, and statute of limitations provisions of the arbitration clause were unconscionable because they thwarted "the [state] legislature's intent to encourage consumers to vindicate their rights." *Id.* at 605, 293 P.3d at 1201. In analyzing whether this outcome was preempted by the FAA after *Concepcion*, the Washington Supreme Court construed *Concepcion* as limited to its facts, *id.* at 609-10, 293 P.3d at 1202-03, so that "*Concepcion* provides no basis for preempting [Washington's] relevant case law nor does it require the enforcement of Freedom's arbitration clause" *id.* at 610, 293 P.3d at 1203.

In *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 490-91, 493-94 (Mo. 2012), the Missouri Supreme Court also sidestepped *Concepcion* in striking down as unconscionable an arbitration clause containing a class waiver in a car title loan agreement. The Missouri high court explained that "[b]ecause the purpose of the [FAA] is to ensure efficient dispute resolution, the analysis in *Concepcion* assumes the availability of a practical, viable means of individualized dispute resolution through arbitration." *Id.* at 494. Since the plaintiff had introduced evidence that no lawyer would take her case to individual arbitration because of the prohibitive costs involved, the court concluded that she could not vindicate her state statutory rights in arbitration and that the FAA therefore did not require enforcement of the arbitration clause. *Id.* at 493-94. This result flouts the decisions in *Concepcion* and *Italian Colors*. *See Italian Colors*, 133 S. Ct. at 2312 n.5 ("[T]he FAA's command to enforce arbitration

agreements trumps any interest in ensuring the prosecution of low-value claims."); *Concepcion*, 131 S. Ct. at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). Indeed, the dissenting opinion condemned the majority for "engag[ing] in intellectual gymnastics to create 'life after *Concepcion*.'" *Brewer*, 364 S.W.3d at 504 (Price, J., dissenting).

The Montana Supreme Court refused to enforce an arbitration clause in a payday loan agreement based on pre-*Concepcion* case law requiring arbitration clauses to clearly and conspicuously explain the consequences of arbitrating because arbitration inherently involves the waiver of fundamental rights to jury trial and access to the courts. *Kelker v. Geneva-Roth Ventures, Inc.*, 369 Mont. 254, 259, 303 P.3d 777, 781 (2013). While the Montana high court portrayed its "clear and conspicuous" test as generally applicable to all contracts, this state-law contract defense is preempted by the FAA because it "appl[ies] only to arbitration [and] derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746.[4]

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[4] The Ninth Circuit has disagreed with the Montana Supreme Court on this point and held that its "reasonable expectations/fundamental rights rule runs contrary to the FAA as interpreted by *Concepcion* because it disproportionally applies to arbitration agreements, invalidating them at a higher rate than other contract provisions." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013).

The New Jersey Supreme Court has followed the same erroneous course. In *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430, 446-48, 99 A.3d 306, 315-16 (2014), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Jan. 21, 2015) (No. 14-882), that court invalidated an arbitration clause in a contract for debt adjustment services because it did not provide the consumer sufficiently clear and unambiguous notice that she was giving up her right to have her statutory claims adjudicated in court. The court explained that "because arbitration involves a waiver of the right to pursue a case in a judicial forum, 'courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.'" *Id.* at 442-43, 99 A.3d at 313. As the Third Circuit held in a similar case, the New Jersey Supreme Court was wrong because "applying a heightened 'knowing and voluntary' standard to arbitration agreements would be inconsistent with the FAA." *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 224 (3d Cir. 2008).

While these cases represent only a handful of the many state court cases that have sought to evade the FAA's preemptive mandate after *Concepcion*, they show that the problem of enforcement of the FAA in state courts persists—particularly in California—and requires this Court's ongoing supervision. As we explain in the next section, the California Court of Appeal's decision in this case is but another example of this trend.

IV. THE CALIFORNIA COURT OF APPEAL'S DECISION IN THIS CASE IS SIMPLY THE LATEST ATTEMPT TO EVADE *CONCEPCION* AND THE FAA.

The court below continued the trend of state court evasion of FAA preemption, this time under the guise of contract interpretation. The result is of a piece with prior state court cases refusing to apply arbitration clauses as written and continues "the judicial hostility towards arbitration that prompted the FAA [which has] manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1747.

DIRECTV's customer agreement contained an arbitration clause that included a class arbitration waiver. Pet. App. 4a-5a. That provision concluded with the following sentence: "'If, however, the law of your [i.e., the customer's] state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 [i.e., the entire arbitration clause] is unenforceable.'" Pet. App. 5a. Imburgia sought to bring a class action against DIRECTV in state court alleging that DIRECTV violated various state consumer protection laws by improperly charging early termination fees to its customers. Pet. App. 3a. After the state trial court denied DIRECTV's motion to compel arbitration, the California Court of Appeal affirmed by applying state law preempted by the FAA. Pet. App. 3a-4a.

The Court of Appeal reasoned that the arbitration clause's reference to "the law of your state" meant "the law of your state without considering the

preemptive effect, if any, of the FAA"—i.e., California law before *Concepcion*. Pet. App. 8a. In doing so, the court relied on contractual interpretation principles under state law (e.g., the specific controls the general, contract language should be construed against the drafter) and rejected contrary holdings of federal courts. Pet. App. 8a-15a; *but see Nitro-Lift*, 133 S. Ct. at 504 ("There is no general-specific exception to the Supremacy Clause."). In particular, the court rejected a Ninth Circuit opinion construing the same provision in DIRECTV's arbitration clause in exactly the opposite way. Pet. App. 12a-15a; *see Murphy*, 724 F.3d at 1225-28. The Ninth Circuit held in *Murphy* that, for purposes of interpreting the phrase "the law of your state" in DIRECTV's arbitration clause, the FAA (as construed in *Concepcion*) "*is* the law of California and of every other state" and that "[i]t follows that, under the doctrine of preemption, the *Discover Bank* rule is not, and indeed never was, California law." *Murphy*, 724 F.3d at 1226. The Ninth Circuit concluded that "[p]laintiffs' contention that the parties intended for state law to govern the enforceability of DIRECTV's arbitration clause, even if the state law in question contravened federal law, is nonsensical." *Id.* The Court of Appeal here brushed *Murphy* aside as "unpersuasive." Pet. App. 13a.

The California Court of Appeal fundamentally erred. It is bedrock constitutional law that "the incorporation of state law does not signify the inapplicability of federal law, for 'a fundamental principle in our system of complex national polity' mandates that 'the Constitution, laws, and treaties of the United States are as much a part of the law of

every State as its own local laws and Constitution.'" *de la Cuesta*, 458 U.S. at 157 (quoting *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880)); *see also Testa v. Katt*, 330 U.S. 386, 390-92 (1947). There is no such thing as California law shorn of the FAA's preemptive effect after *Concepcion*. Federal law (including *Concepcion*'s interpretation of the FAA) is the law of California and always has been, and the reference to "the law of your state" in the DIRECTV arbitration clause incorporates the effect of FAA preemption. No matter how much California courts may wish to apply the anti-arbitration policy animating California law prior to *Concepcion* to invalidate arbitration clauses containing class action waivers, they cannot "opt out" of the Supremacy Clause.

The Court of Appeal's opinion in this case is but the latest example of a regrettable trend this Court noted in *Concepcion*—that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Concepcion*, 131 S. Ct. at 1747. The transparency of the Court of Appeal's error is striking, confirming that the judicial hostility to arbitration that the FAA was enacted to extinguish is still alive and well in California.

Twice in recent years, this Court has been forced to summarily reverse state court rulings refusing to obey the Supremacy Clause and apply the FAA to invalidate state laws that are preempted by the FAA after *Concepcion*. *See Nitro-Lift*, 133 S. Ct. at 503 ("'It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.'"); *Marmet*, 132 S. Ct. at 1202

("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established."). This Court should again reverse in this case and instruct the lower court and other state courts to follow the Supremacy Clause and the policy of the FAA by enforcing arbitration agreements as written, even when this leads to a result at odds with state public policy, state unconscionability doctrine, or other principles of state law.

CONCLUSION

For the foregoing reasons and for the reasons stated in DIRECTV's opening brief on the merits, this Court should reverse the California Court of Appeal's decision and remand for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

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